No. 81-2182

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

DEAN GANA, PETITIONER

v.

STATE OF HAWAII

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

THE LAW OFFICES OF
CHARLES L. GOLDBERG
303 West "A" Street
San Diego, CA 92101

CHARLES L. GOLDBERG
Attorney for Petitioner
DEAN GANA

QUESTION PRESENTED

Whether a state court has the jurisdiction to issue a search warrant for the search and seizure of a first class mail parcel in the possession and custody of United States Postal Officials at a United States Post Office.

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DEAN GANA, PETITIONER [1]

v.

STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Charles L. Goldberg, on behalf of petitioner DEAN GANA, petitions for a

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1. Stephen G. McCully was a co-defendant and co-appellant, but is not petitioning for a writ of certiorari.

writ of certiorari to review the judgment of the Supreme Court of the State of Hawaii in this case.

OPINION BELOW

The opinion of the Hawaii Supreme Court (Appendix A, infra, pages 1A to 20a) is not yet reported.

JURISDICTION

The judgment of the Supreme Court of the State of Hawaii was entered on April 16, 1982, at 9:39 a.m., pursuant to the opinion dated March 24, 1982. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, Clause 2 of the Constitution provides:

> This constitution, and the laws of the United States . . . shall be the supreme law.

Article I, Section 8, Clause 7 of the Constitution provides:

> The Congress shall have the power . . . to establish post offices and post roads.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 39, United States Code section 3623, subdivision (D) provides:

> The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation of mail by the postal service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer, or employee of the postal service for the sole purpose of determining an address at which the

letter can be delivered, or pursuant to the authorization of the addressee.

STATEMENT

This case involves the search and seizure by the Hawaii County police armed with a Hawaii County search warrant of a first class mail parcel in the possession of the United States Postal Officials at the Hilo Airport Post Office in Hawaii.

On February 2, 1978, an officer in the Vice Division of the Hawaii County Police Department contacted federal postal officials at the Hilo Airport Post Office seeking information regarding a post office box registered in the name of Steven G. McCully and any parcels recently mailed to his post office box. On February 6, 1978, after being informed of the presence of a first class parcel at the post office, the local police officer contacted a Hawaii State Court Judge and obtained a State search warrant for the parcel. There was no

cooperation by Federal Postal Inspectors in obtaining this Warrant. (See Appendix D).

After being served with the State search warrant on February 6, 1978, the postal officials relinquished the parcel into the custody of the local police officer. A search by the local police officer of the parcel uncovered a brown powder which was determined to be methamphetamine. The local officers then called a U.S. Postal Inspector and the package was then resealed and reinserted into the mail on February 6, 1978, by the postal inspector. On the afternoon of February 6, 1978, Steven McCully was observed picking up the parcel from the post office and taking it to his residence. Based upon this information, search warrants were obtained for the residence, vehicle, and person of Steven McCully.

Petitioner GANA and McCully were then indicted for attempting to promote and promoting dangerous drugs in violation of HRS sections 705-500, 712-1242, 712-1243, and 712-1241.

The Third Circuit Court granted Petitioner GANA's motion to suppress concluding that the State search warrant was invalid as a federal search warrant was required and should have been obtained to search and seize an item in the first class mail. The Court further concluded that this primary illegality tainted the subsequent searches and seizures. (See Appendix D). The Government appealed pursuant to Rule 37 of the Hawaii Rules of Penal Procedure and Chapter 602 and 641, H.R.S.

It is undisputed that the judge who issued the search warrant was acting in his capacity as a State Judge.

Additionally, it is undisputed that the first search and seizure of the first class mail parcel tainted all evidence subsequently obtained by the State police officers.

On appeal, the Supreme Court of the State of Hawaii ruled that the language in Title 39, United States Code section 3623(d) providing for the search of first class mail under "authority of a search warrant authorized by law" had been interpreted by the United States Postal Service as authorizing State Courts to issue search warrants for first class mail. The Court ruled that the inclusion of State search warrant under a statute requiring "search warrant authorized by law" was not palpably erroneous. (See Appendix A).

REASONS FOR GRANTING THE WRIT

1. CONFLICTS WITH UNITED STATES CONSTITUTION

The Supreme Court of Hawaii construes Title 39, United States Code, section 3623,

subdivision (d) as authorizing State Courts to issue State search warrants for the search and seizure of first class mail parcels. However, in arriving at this conclusion, the Hawaii Supreme Court inexplicably and completely ignores the United States constitutional question of whether the Supremacy Clause permits State interference with the federal postal system.

Presumably Article I, section 8, clause 7 of the United States Constitution confers upon the United States Congress the exclusive jurisdiction of establishing post offices and post roads. Pursuant to this authority Congress enacted Title 39 of the United States Code. Likewise, the United States Postal Service adopted federal regulations and procedures to govern the postal system. 2/

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2. Postal Service Manual 115.6 42 Fed.Reg. 18, 757 (April 8, 1977).

Despite the obvious federal character of the postal system, the State of Hawaii has self-proclaimed its right to search and seize first class mail parcels in exclusive custody of the United States Postal Officials.

Numerous courts have noted that the power of Congress to protect the mail is exclusive and embraces whatever measures are deemed necessary to insure the safe and speedy transit and prompt delivery of the mail and mail matter.[3/] In fact, once an item is deposited in the mail, it becomes in essence, property of the national Government and thus subject to the exclusive control of the Federal Government.

The self-conferred power of the State of Hawaii conflicts with this exclusive jurisdiction of Congress by allowing Hawaii to seize items from the

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3. United States v. Maxwell, 137 F.Supp., 298 (W.D. Mo. 1955);

mail. In McCulloch v. Maryland, 4 Wheaton 316 (1819), the United States Supreme Court held that the Supremacy Clause prohibits state interference with federal banking even where the State has concurrent jurisdiction. Here, the State of Hawaii is attempting to interfere with the exclusive jurisdiction of the United States Post Office, a much greater conflict prohibited by the Supremacy Clause.

The inevitable conflict which will result when a State Court attempts to enforce its warrants against a reluctant postal employee will clearly place a direct and substantial burden upon the postal system. This type of direct infringement is strictly prohibited by the Supremacy Clause of the United States Constitution and mandates a reversal of the Hawaii Court's ruling.

2. CONFLICTS WITH OTHER STATE RULINGS

The ruling of the Hawaii Supreme Court creates a conflict of law between the State of Hawaii and the State of California. The California Supreme Court in Ex Parte Phoedivius, 177 C. 238 (1918) previously ruled that a State Court does not have authority to issue a state search warrant for the search and seizure of the United States mails. Thus, this petition should be granted to resolve this important question of federal law.

3. UNAUTHORIZED CONTROL OVER POSTAL SYSTEM

The Hawaii Supreme Court interprets federal legislation as conferring powers upon the individual states which were not contemplated by Congress in enacting this specific provision. The Hawaii Supreme Court reasons that Congress intended Title 39 U.S.C. section 3623(d) as a delegation to the states of its exclusive jurisdiction over the mails.

There is absolutely no basis in law or in the legislative history of the statute for this conclusion. Title 39, section 3623, subdivision (d) was the replacement of the previous section 4057 of the same title enacted in 1960. That section utilized different language to require in essence that a search warrant authorized by law was a prerequisite to the opening of any first class mail.[4/]

Section 4057 was in turn, the compilation of numerous previous statutes enacted by Congress.

The legislative history of Title 39, section 4057 indicates that it was based

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4. Former Title 39, section 4057 provided:

> Only an employee opening dead mail by authority of the Post Master General, or a person holding a search warrant authorized by law may, open any letter or parcel at the first class which is in the custody of the Department.

on previous sections Title 18 U.S.C. section 1717(c) enacted June 25, 1948 and Title 39 U.S.C. sections 256, 259 and 732.[5/] Each of these sections contained provisions prohibiting the opening of letter mail other than by postal employees. The purpose of the Postal Reorganization Act of 1970 was clearly not to delegate the jurisdiction of Congress over the mails to individual states but was "to convert the Post Office Department into an independent establishment in the executive branch of the Government freed from direct political pressures and endowed with the means of building a truly superior mail service."[6/]

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5. United States Congressional and Administrative News, 1960, Volume 1, page 917.

6. United States Congressional and Administrative News 1970, Page 3650.

In reviewing the legislative history and the terms of previous statutes, it is manifestly apparent that section 4057 and its progeny section 3623, subdivision (d) were not intended by Congress as a delegation of its exclusive jurisdiction to regulate the mails. The interpretation by Hawaii of this statute is contrary to the true intent of Congress and creates an unauthorized State power over the federal postal service.

4. ERRONEOUS RULE OF CONSTRUCTION

The standard of review adopted by the Supreme Court of Hawaii in construing this statute is ambiguous and inconsistent. The Hawaii Supreme Court reverses the Circuit Court decision by stating that the inclusion of state search warrant under a statute requiring search warrant authorized by law was not "palpably erroneous." (See Appendix "A" page 20a).

5. DISREGARDS FACTUAL FINDINGS OF TRIAL COURT

The Supreme Court of Hawaii concludes that the legal situation on February 2, 1978, with respect to the practice in the postal service was to honor search warrants issued by State Courts and served by state officers (see Appendix "A" page 16a). Without relying on the findings of facts by the Circuit Court Judge, the Hawaii Supreme Court, for the first time on appeal makes an independent finding of fact based on the brief testimony of Postal Inspector Ovelgonne. This finding is based on the brief testimony that in the six years that Ovelgonne had been a postal inspector in California, he participated in controlled deliveries approximately 25 times and about 90 percent of those deliveries involved state search warrants. Inspector Ovelgonne in fact testified that it was the usual procedure for the

controlled delivery of a mail parcel to go through the United States Postal Inspectors participating with federal officers and that after the postal authorities had delivered the package to the recipient, that a state search warrant would then be executed for the seizure of the parcel.

Not only does the Supreme Court of Hawaii attempt to make a factual finding based on meager testimony not even purporting to deal with the same issue of what the practice in the postal service was, but the finding of the Supreme Court is factually incorrect.

Inspection service directives to postal officials available to the inspective service personnel at the time of the search in the instant case stated that State warrants for mail should not be honored.[7/] These directives were

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7. Division Circular No. 14 dated June 13, 1977; Chief Inspector All Region

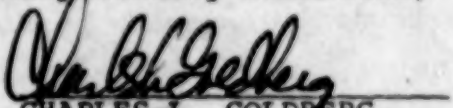
also in the opinion postal regulations on February 6, 1978, 39 CFR 211.1(A)(3) (1977). Thus, the Supreme Court of Hawaii's conclusion that the practice in the postal service was not only without legal basis, but was without factual basis. Accordingly, the decision of the Supreme Court of Hawaii and its attempt to base its conclusion that state search warrants were authorized pursuant to Title 39, section 3623, subdivision (d), and the practice in the postal service, must be overturned.

CONCLUSION

The petition for Writ of Certiorari should be granted.

DATED: 5-24-82

Respectfully submitted,



CHARLES L. GOLDBERG
Attorney for Petitioner
DEAN GANA

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7. - All Division Letter, Subject: State Search and Seizure Warrants Against Mail. (See Appendixes F and G).